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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91213949
Party	Defendant Auris, Inc.
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Date	02/24/2014
Attachments	Auris_Applicant's Motion to Set Aside Notice of Default.pdf(188466 bytes)

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)	
Cima Telecom)	
)	
Opposer)	
)	Opposition No. 91213949
v.)	Appl. No.: 85889443
)	
Auris, Inc.)	
)	
Applicant.)	
)	

**APPLICANT'S MOTION TO SET ASIDE NOTICE OF DEFAULT AND FOR
LEAVE TO FILE ANSWER**

Applicant hereby submits this motion to set aside notice of default.

Applicant's answer to the notice of opposition was due on January 20, 2014.

Applicant was unaware of the notice of opposition that was instituted by the Opposer because Applicant did not receive service in a timely manner. Therefore, Applicant requests leave to file its Answer.

A. The Motion to Set Aside the Notice of Default is for Good Cause.

The standard for setting aside a Notice of Default is good cause. If a defendant/respondent who has failed to file a timely answer to the complaint/opposition responds to a notice of default by filing a satisfactory showing of good cause why default judgment should not be entered against it, or a motion asking that its late-filed answer be accepted, the courts and the Board will grant the motion. Fed. R. Civ. P. 55(c);

Trademark Trial and Appeal Board Manual of Procedure (TBMP), §312.02. Good cause why default judgment should not be entered against a respondent, for failure to file a timely response is usually found when the defendant shows that (1) the delay in filing a response was not the result of willful conduct or gross neglect on the part of the respondent, (2) the oppose will not be substantially prejudiced by the delay, and (3) the respondent has a meritorious defense to the action. In exercising that discretion, the Board must be mindful of the fact that it is the policy of the law to decide cases on their merits. Accordingly, the Board is very reluctant to enter a default judgment for failure to file a timely response, and tends to resolve any doubt on the matter in favor of the respondent. TBMP, §312.02. The federal cases are in accord with the policy of the Board.

i. Applicant's Delay in Filing the Answer was not Willful and did not Constitute Gross Neglect

The delay here was not the result of willful conduct or gross neglect. Applicant was working in India during the months of service and due date of Answer. The Service on Applicant's Delaware Corporate Agent did not reach Applicant. Applicant was unaware the Opposition had been filed.

Pursuant to 37 C.F.R. §2.101(a) an opposition proceeding is commenced by filing a timely Notice of Opposition with the required fee. The notice must include proof of service on the applicant, as detailed in §§2.101(b) and 2.119. According to §2.119(b)(6), Service may be effectuated by electronic transmission, such as email or facsimile, only when mutually agreed upon by the parties. Not only did Opposer not request consent, Opposer never served an electronic copy of the Notice of Opposition, as indicated in its

certificate of service. Proof of service assumes actual service on the applicant. *Springfield Inc. v. XD*, 86 USPQ2d 1063, 1064 (TTAB 2008).

B. The Opposer will not be substantially prejudiced by the delay

In this case, the Opposer will not be prejudiced by the delay in response. Applicant's delay in responding to the Notice of Opposition has not caused Opposer to expend any time, money or resources to compel Applicant's Answer. If the Board sets aside the Notice of Default, Opposer will have ample opportunity to make its case. Accordingly, it is submitted that Opposer has not been and will not be substantially prejudiced.

C. Applicant has a meritorious defense to the Notice of Opposition

The showing of a meritorious defense does not require an evaluation of the merits of the case. All that is required is a plausible response to the allegations in the complaint. TBMP §312.02. Applicant has a meritorious defense to the Notice of Opposition as set forth in Applicant's Answer.

According to the Trademark Trial and Appeal Board Manual of Procedure, the Board may exercise its sound discretion in determining whether to enter a Default Judgment. TBMP §312.02.

"In exercising that discretion, the Board must be mindful of the fact that it is the policy of the law to decide cases on their merits. Accordingly, the Board is very reluctant to enter a default judgment for failure to file a timely answer, and tends to resolve any doubt on the matter in favor of the defendant."


Keeping in mind that it is the policy of the law to decide cases on their merits, the Board should liberally construe the statute in the instant matter and grant this Motion.

D. Applicant Requests Leave to File its Answer

For the foregoing reasons, Applicant respectfully requests that the Board Set Aside the Notice of Default and grant an extension of time to file the response to the Notice herein.

Respectfully submitted,

Dated: February 11, 2014

By: 

Laura Slezing
Venture Gained Legal, LLP
Attorneys for the Applicant
Auris, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing APPLICANT'S MOTION TO SET ASIDE NOTICE OF DEFAULT AND FOR LEAVE TO FILE ANSWER has been served on counsel for Opposer (listed below) by mailing said copy on February 10, 2014, via First Class Mail to:

J. Rodman Steele, Jr.
DUANE MORRIS LLP
5100 Town Center Circle, Suite 650
Boca Raton, FL 33486-9000
UNITED STATES

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: February 11, 2014



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